

ALABAMA RULES OF EVIDENCE

Rule 505. - Communications to clergymen.

(a) **Definitions.** As used in this rule:

(1) A "clergyman" is any duly ordained, licensed, or commissioned minister, pastor, priest, rabbi, or practitioner of any bona fide established church or religious organization; the term "clergyman" includes, and is limited to, any person who regularly, as a vocation, devotes a substantial portion of his or her time and abilities to the service of his or her church or religious organization.

(2) A communication is "confidential" if it is made privately and is not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) **General rule of privilege.** If any person shall communicate with a clergyman in the clergyman's professional capacity and in a confidential manner, then that person or the clergyman shall have a privilege to refuse to disclose, and to prevent another from disclosing, that confidential communication.

(c) **Who may claim the privilege.** The privilege may be claimed by the communicating person, by that person's guardian or conservator, or by that person's personal representative if that person has died, or by the clergyman.

ADVISORY COMMITTEE'S NOTES

Rule 505 tracks, but supersedes, a preexisting statute creating a clergyman privilege in Alabama. Ala. Code 1975, § 12-21-166. See C. Gamble, McElroy's Alabama Evidence § 419.01 (4th ed. 1991). Additionally, some provisions are taken from Unif. R. Evid. 505 and Fed. R. Evid. 506 (not enacted). The development of a clergyman privilege, prior to the broad adoption of evidence rules, had occurred in about two-thirds of the states and the privilege had been adopted in those states by both statute and case law. See 8 J. Wigmore, Wigmore on Evidence § 2395 (McNaughton rev. 1961). Sub (a)(1). Definition of "clergyman." This definition of "clergyman" is necessarily a broad one. It is not sufficiently broad, however, to include "all self-denominated "ministers." Fed. R. Evid. 506 (not enacted) advisory committee's note. The terms "ordained," "licensed," and "commissioned" focus upon the rules of the particular church or religious organization that govern entrance into the ministry. A good explanation of the term "bona fide established church or religious organization" can be found in the following passage taken from the advisory notes to the proposed, but rejected, Federal Rule of Evidence 506:

"A fair construction of the language requires that the person to whom the status is sought to be attached be regularly engaged in activities conforming at least in a general way with those of a Catholic priest, Jewish rabbi, or minister of an established Protestant denomination, though not necessarily on a full-time basis."

Like the statutory privilege it supersedes, the Rule 505 privilege does not attach when the person consulted is not in fact a clergyman, even if the person consulting reasonably believes that person to be a clergyman. This principle is consistent with the corresponding principle found in the psychologist-patient privilege. See Ala. R. Evid. 503(a)(2)(B).

Subsection (a)(2). Definition of "confidential." The definition of this term is consistent with its use in the attorney-client privilege. See Ala. R. Evid. 502(a)(5). Whether a communication is "confidential" is largely determined by deciding whether the communicating person intended to create a confidential communication, i.e., one not to be communicated to unnecessary third parties. The communication must have been made with the express or implied understanding that it should not be revealed to another. *Lucy v. State*, 443 So. 2d 1335 (Ala. Crim. App. 1983). The presence of third parties whose presence is not necessary to the making of the communication indicates a lack of intent to communicate confidentially. The presence of a third party, however, does not destroy confidentiality if that third person is present to further the communication. No comparable provision exists in the preexisting statute creating Alabama's clergyman privilege. Ala. Code 1975, § 12-21-166(b).

Section (b). General rule of privilege. The privilege arises only when the person communicates with a clergyman in the latter's professional capacity. A similar limitation is placed upon the attorney-client privilege when the client consults a lawyer for some purpose other than to secure legal advice. See Ala. R. Evid. 502(a)(1) advisory committee's notes. Communications to the clergyman in furtherance of a crime or a fraud would not qualify as seeking spiritual advice and therefore would not fall within the protection of the privilege. Compare Fed. R. Evid. 506(b) (not enacted) advisory committee's note.

The statutory language providing Alabama's preexisting clergyman privilege appears to limit the privilege to consultations with a clergyman that are either confessional or marital in nature. The committee thinks the role of the

clergyman in modern society is much broader. Consequently, the committee proposed the language of Rule 505, in lieu of that found in the preexisting statute, so as to render the privilege applicable to all conferences where the clergyman is consulted in the professional capacity of spiritual advisor in the broadest sense.

The preexisting statute, upon which Rule 505 is based, protected "anything said by either party during such communication." The phrase "confidential communication" is adopted in lieu of this language, but with the same broad coverage. Additionally, it is intended that the principle of Alabama's preexisting case law will continue insofar as it takes an expansive view of "communication," so that it may include statements made, acts that are synonymous with statements, and, in some instances, noncommunicative acts. See Ala. R. Evid. 504(b); *Arnold v. State*, 353 So. 2d 524 (Ala. 1977).

As with the corresponding rule in the attorney-client privilege, any person privy to the communication may be prevented from relating what was said, so long as the communication otherwise qualifies as a confidential, clergyman communication. Compare Ala. R. Evid. 502(b). This necessarily abrogates the common law "eavesdropper rule," under which one who overheard an otherwise confidential communication -- whether by eavesdropping or by accident -- could relate what was overheard even if it was an otherwise fully privileged communication. *Howton v. State*, 391 So. 2d 147 (Ala. Crim. App. 1980). It should be noted that this abrogation of the eavesdropper rule goes beyond the preexisting, but now superseded, statutory privilege. The statute provided that the penitent or priest was privileged to preclude only "the other from disclosing." Ala. Code 1975, § 12-21-166(b).

Section (c). Who may claim the privilege. As under the preexisting statute, the privilege belongs to, and may be asserted by, both the communicant and the clergyman. See Ala. Code 1975, § 12-21-166(b). In the majority of jurisdictions, in contrast, the clergyman may not assert the privilege in his or her own right. *Deudy v. Deudy*, 130 Misc. 168, 495 N.Y.S.2d 616 (N.Y. Sup. Ct. 1985) (refusing to allow clergyman to assert the privilege, after waiver by communicant, but recognizing that some state statutes grant an independent privilege to the clergyman). Cf. E. Cleary, McCormick on Evidence § 73.1 (3d ed. 1984) (commenting that, in regard to privileges generally, persons other than the communicant may bring the existence of the privilege to the court's attention but that normally this is regarded as having been done in behalf of the communicant or holder of the privilege).

The committee envisions that under Rule 505, as under the preexisting statute, the assertion of this privilege will be recognized broadly in a variety of trials, hearings, and proceedings of both a legal and a quasi-legal nature, including proceedings before an administrative agency of the state or a political subdivision thereof. See Ala. Code 1975, § 12-21-166(a)(2). The committee deemed it unnecessary to include an express provision to that effect in Rule 505, because all privileges are applicable in all proceedings. Ala. R. Evid. 1101(c).

CASENOTES

1. Generally

Threats of violence toward third parties that are revealed to clergy are not covered by the "communications to clergyman privilege" and clergy may testify as to those threats in subsequent proceedings. *Tankersley v. State*, 724 So.2d 557 (Ala.Crim.App.1998), rehearing denied, certiorari denied